# Syed Jaafar bin Syed Ibrahim v Maju Mehar Singh Travel & Tours Sdn Bhd

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO S2-22-468 OF 1993
KAMALANATHAN RATNAM J
6 AUGUST 1999

***Contract*** *— Damages — Expenses incurred due to breach by defendant — Receipts did not link payments to plaintiff or the case — Whether proved*

***Contract*** *— Formation — Oral contract — Whether should be reduced to writing — Whether intention to create binding contract*

***Contract*** *— Terms — Oral contract, evidenc of — Obligation under — Whether plaintiff to provide service for application of visa — Proof of*

The plaintiff — a farmer from a village in Kota Bharu, Kelantan — ventured into a part-time business wherein he did the necessary travel arrangements for persons in his village who wanted to perform the Umrah and Haj in Mecca. The defendant was a travel agency in Kuala Lumpur, catering for all destinations including Jeddah during the Umrah and Haj seasons. The plaintiff claimed that in December 1991 he met with DW1, the Managing Director of the defendant whereby DW1 orally agreed that in consideration of the plaintiff providing passengers to the defendant and collecting RM5,500 per person, the defendant would, inter alia, issue return air tickets for the Haj, apply and obtain visas for the passengers and pay commission of RM200 to the plaintiff for every passenger brought by him for the defendant. The plaintiff had collected 151 passengers to perform the Haj in May 1992 and from them he had obtained RM830,500 and the monies had been paid over to the defendant. Upon full payment by him to the defendant for the 151 passengers, DW1 informed him that these passengers were scheduled to leave from Subang International Airport in two separate groups: 74 passengers to depart on 11 May 1992 and 72 passengers to depart on 18 May 1992. The plaintiff then made arrangements for the departure of these passengers from Kelantan to Kuala Lumpur. He purchased return air tickets for a total sum of RM27,180. On 11 May 1992, the defendant informed the plaintiff that they could not manage to obtain visas for the passengers and as such they could not depart on the scheduled flight. However, the defendant informed the plaintiff that the first group of passengers could depart with the second group on 18 May 1992 when the defendant would have obtained all the visas by then. The plaintiff claimed that he had to make arrangements for accommodation and provide food for these passengers in Kuala Lumpur. On 18 May 1992, the second group arrived from Kota Bharu to Kuala Lumpur. Again the defendant told the plaintiff that they could not obtain the visas for the passengers and that all the passengers could not depart on that scheduled flight. The plaintiff again had to arrange for accommodation and food for the second group of passengers. All the

passengers finally return to Kota Bharu on 5 June 1992. The plaintiff claimed against the defendant for the cost of the Haj tickets (RM614,500), the cost of bringing the passengers from Kota Bharu to Kuala Lumpur (RM27,180) and expenses incurred in putting up the passengers in Kuala Lumpur when they were stranded from 11 May 1992 to 5 June 1992 (RM53,286).

**Held:**

(1) The court accepted the plaintiff's evidence that there was an agreement between the plaintiff and the defendant. The plaintiff was a simple villager bent on making a commission out of this Haj/Umrah travel. All the ingredients necessary to constitute an oral agreement existed in this case. The defendant's contention that such an agreement ought to have been reduced in writing seemed to ignore the existence of oral contracts. The court found that both the plaintiff and defendant intended to create a binding contract (see p 418F–G).

(2) It was inconceivable to imagine that the plaintiff, whilst collecting a sum of RM5,500 would split the sum, maintain an account, and go through the ordeal of applying for individual visas for 151 passengers when he could have easily gone to any other ticketing agent and obtained such a service. Besides, the plaintiff being a simple villager intending only on making a commission of RM200 on each passenger could not be expected to provide a cumbersome service of applying for visas. Therefore, the court rejected the defendant's contention that it was the plaintiff who applied for the visas and that the defendant had nothing to do with the visa application (see pp 419G–420A).

(3) There was no evidence that the passengers had not been refunded their money nor been furnished a ticket subsequently. There was also no evidence that the passengers had authorized the plaintiff to sue on their behalf or that the plaintiff was suing on a representative capacity. In the circumstances, the court was constrained to hold against the plaintiff for having failed to satisfy the court to claim the sum of RM614,500 (see p 422D–F).

(4) There was no evidence from the plaintiff that he did not collect the sum of RM27,180 from the 151 passengers and that he had on his own paid this sum and was seeking recovery. In the absence of such evidence and considering the fact that the plaintiff was only looking to a RM200 commission, it seemed unlikely that he had made the up-front payment. In the circumstances, the plaintiff had failed to prove this item of the damage (see pp 422I–423A).

(5) CABD 53-58 showed cash payment receipts from various hotels and restaurants. There was nothing on the receipts to link the payment to the plaintiff nor to this case. It is trite law that special damages must be both specifically pleaded and proved. In the circumstances the plaintiff had also failed to prove this claim (see p 423B–C).

A **[Bahasa Malaysia summary**

Plaintif — seorang petani dari sebuah perkampungan di Kota Bharu, Kelantan — telah melibatkan diri di dalam perniagaan sambilan di mana beliau mengendalikan pengurusan perjalanan-perjalanan yang patut untuk penduduk di kampung beliau yang ingin mengerjakan B Umrah dan ibadat Haji di Mekah. Defendan merupakan sebuah agensi pelancongan di Kuala Lumpur, yang mengendalikan perjalanan ke semua destinasi-destinasi termasuklah Jedah semasa musim Umrah dan Haji. Plaintif mendakwa bahawa pada bulan Disember 1991, beliau bertemu dengan DW1, Pengarah Urusan defendan di mana DW1 telah bersetuju secara lisan bahawa sebagai C balasan plaintif memberikan penumpang-penumpang kepada defendan dan mengutip RM5,500 daripada setiap orang, defendan akan, antara lain, membekalkan tiket-tiket penerbangan pergi balik untuk Haji, memohon dan mendapatkan visa-visa untuk penumpang-penumpang dan membayar komisen sebanyak RM200 kepada plaintif bagi setiap penumpang yang dibawa oleh beliau kepada defendan. D Plaintif telah dapat mengumpul 151 orang penumpang untuk mengerjakan ibadat Haji pada bulan Mei 1992 dan daripada mereka beliau telah memperolehi sejumlah RM830,500 dan wang tersebut telahpun dibayar kepada defendan. Setelah membuat bayaran penuh oleh beliau kepada defendan untuk 151 orang penumpang itu, DW1 E telah memaklumkan kepada beliau bahawa penumpang-penumpang itu dijadualkan berlepas daripada Lapangan Terbang Antarabangsa Subang di dalam dua rombongan yang berasingan: 74 orang penumpang berlepas pada 11 Mei 1992 dan 72 orang penumpang berlepas pada 18 Mei 1992. Plaintif kemudiannya telah mengaturkan keberangkatan penumpang-penumpang itu dari Kelantan ke Kuala F Lumpur. Beliau telah membeli tiket-tiket penerbangan pergi balik bagi jumlah sebanyak RM27,180. Pada 11 Mei 1992, defendan telah memaklumkan plaintif bahawa mereka tidak dapat memperolehi visa-visa untuk penumpang-penumpang itu dan oleh itu penumpang-penumpang itu tidak dapat berlepas pada penerbangan yang telah dijadualkan itu. Namun begitu, defendan telah memaklumkan kepada G plaintif bahawa rombongan pertama penumpang-penumpang itu boleh berlepas bersama dengan rombongan kedua penumpang-penumpang pada 18 Mei 1992 di mana defendan sepatutnya akan memperolehi semua visa-visa pada hari tersebut. Plaintif mendakwa bahawa beliau terpaksa menguruskan penginapan dan makanan H penumpang-penumpang yang berada di Kuala Lumpur itu. Pada 18 Mei 1992, rombongan kedua itu itu telah tiba dari Kota Bharu ke Kuala Lumpur. Sekali lagi defendan telah memberitahu plaintif bahawa mereka tidak dapat memperolehi visa-visa untuk penumpang-penumpang itu dan semua penumpang-penumpang itu tidak dapat berlepas pada penerbangan yang telah dijadualkan itu. Plaintif sekali I lagi terpaksa menguruskan penginapan dan makanan untuk rombongan kedua penumpang-penumpang itu. Semua penumpang-penumpang akhirnya telah pulang ke Kota Bharu pada 5 Jun 1992. Plaintif menuntut terhadap defendan untuk kos tiket-tiket Haji

(RM614,500), kos membawa penumpang-penumpang daripada Kota Bharu ke Kuala Lumpur (RM27,180) dan perbelanjaan-perbelanjaan yang terpaksa ditanggung untuk menempatkan penumpang-penumpang itu di Kuala Lumpur ketika mereka tersangkut di situ daripada 11 Mei 1992 hingga 5 Jun 1992 (RM53,286). A

**Diputuskan:** B

(1) Mahkamah menerima keterangan plaintif bahawa wujudnya satu perjanjian antara plaintif dan defendan. Plaintif merupakan seorang penduduk kampung yang sederhana yang ingin mendapat komisen daripada perjalanan Haji/Umrah tersebut. Semua unsur-unsur yang perlu untuk membentuk satu perjanjian lisan wujud di dalam kes ini. Pendapat defendan bahawa perjanjian sebegini sepatutnya dijadikan dalam bentuk bertulis seolah-olah seperti tidak memperdulikan kewujudan kontrak secara lisan. Mahkamah mendapati bahawa kedua-dua plaintif dan defendan mempunyai tujuan untuk mewujudkan satu kontrak yang mengikat (lihat ms 418F–G). C D

(2) Adalah sukar untuk mempercayai bahawa plaintif, semasa mengutip sejumlah RM5,500 boleh membahagikan jumlah itu, menyenggarakan akaun, dan melalui pengalaman memohon visa-visa perseorangan untuk 151 penumpang-penumpang itu apabila beliau boleh dengan senangnya pergi ke mana-mana agensi pertiketan yang lain dan mendapatkan perkhidmatan sebegitu. Lagipun, plaintif seorang penduduk kampung yang sederhana yang bertujuan hanya untuk mendapatkan komisen sebanyak RM200 bagi setiap penumpang-penumpang tidak mungkin boleh dijangkakan akan menyediakan perkhidmatan memohon visa-visa yang menyusahkan itu. Oleh itu, mahkamah menolak pendapat defendan bahawa plaintiflah yang memohon untuk visa-visa itu dan bahawa defendan tidakada apa-apa kaitan dengan permohonan visa itu (lihat ms 419G–420A). E F

(3) Tiada keterangan bahawa penumpang-penumpang itu tidak dikembalikan wang mereka ataupun diberikan tiket kemudiannya. Tiada juga keterangan bahawa penumpang-penumpang itu telah memberikan kebenaran kepada plaintif untuk menyaman bagi pihak mereka atau bahawa plaintif menyaman sebagai satu kuasa perwakilan. Di dalam keadaan ini, mahkamah terpaksa memutuskan terhadap plaintif kerana gagal meyakinkan mahkamah dalam menuntut jumlah RM614,500 itu (lihat ms 422D–F). G H

(4) Tiada keterangan daripada plaintif bahawa beliau tidak mengutip sejumlah RM27,180 daripada 151 orang penumpang dan bahawa beliau sendiri telah membayar jumlah itu dan menuntut untuk mendapatkan kembali jumlah itu. Dengan ketiadaan keterangan sedemikian dan mengambil kira fakta bahawa plaintif hanya ingin mendapatkan komisen sebanyak RM200, adalah tidak bermungkinan beliau telah membuat bayaran pendahuluan. Di dalam keadaan ini, plaintif telah gagal untuk membuktikan butiran ganti rugi ini (lihat ms 422I–423A). I

(5) CABD 53–58 menunjukkan resit-resit bayaran tunai daripada pelbagai hotel dan restoran. Tidak ada apa-apa di atas resit-resit itu yang mempunyai kaitan dengan bayaran kepada plaintif ataupun kes ini. Adalah undang-undang mantap bahawa ganti rugi khas mestilah dipohon dan dibuktikan sekaligus. Di dalam keadaan ini, plaintif juga telah gagal untuk membuktikan tuntutan beliau (lihat ms 423B–C).]

**Notes**

For cases on formation of contract, see 3 *Mallal's Digest* (4th Ed, 1997 Reissue) paras 2152–2212.

For a case on terms of oral contracts, see 3 *Mallal's Digest* (4th Ed, 1997 Reissue) paras 3071.

For cases on damages generally, see 3 *Mallal's Digest* (4th Ed, 1997 Reissue) paras 1955–2051.

*Mah Weng Kwai* (*Sharmitha Visvalingam* with him) (*Mah Weng Kwai & Associates*) for the plaintiff.

*Arjan Pursumal* (*N Ramesh* with him) (*Sri Ram & Co*) for the defendant.

*Cur Adv Vult*

**Kamalanathan Ratnam J**:

*Facts*

The plaintiff was at all material times a farmer from a village called Kampung Chekeli in Kota Bharu, Kelantan. Sometime in 1990 he ventured into a 'part-time business' wherein he did the necessary travel arrangements for 12 persons from in and around his village, who wanted to perform the Umrah and Haj in Mecca. The plaintiff approached a travel agency in Kota Bharu known as Mars Travel Sdn Bhd which through one Gurbakh Singh from the said agency (Gurbakh) issued return air tickets to Jeddah, applied for the visas for these passengers and made arrangements for their accommodation in Mecca, all for the sum of RM5,500 each, collected by the plaintiff from these passengers for the said travel agent. In return the plaintiff received a commission from the said travel agent for his efforts. The plaintiff contended that the same arrangement was carried out with the said travel agent in 1991. In 1992, however, the plaintiff claimed that the said travel agent was unwell and could not do the said arrangements for the plaintiff. However, the said travel agent recommended the plaintiff to approach the defendant to make the above arrangements for the plaintiff. Thus the plaintiff became involved with the defendant on a similar agreement.

FINDINGS OF THE COURT

*Was there an agreement between the plaintiff and the defendant?*

At all material times the defendant is a travel agency in Kuala Lumpur. Its managing director, Mehar Singh (DW1) stated that the defendant was

established around 1979 and catered for all types of destinations including Jeddah during the Umrah and Haj seasons. A

Based on the recommendation by Gurbakh the plaintiff claimed that on 5 December 1991 the plaintiff along with one Norizah bte Hassan (PW3) arrived at Kuala Lumpur to meet DW1. PW3 confirmed this in her evidence. At that time, the plaintiff stated that he had already gathered 100 persons from various villages in Kota Bharu who wanted to perform the Haj in May 1992. He had also collected some monies from them and their passports for purposes of the travel arrangement. B

After meeting the defendant and discussing with him, the plaintiff contended that DW1 orally agreed that in consideration of the plaintiff providing these passengers to the defendant and collecting RM5,500 per person the defendant would: C

(i) issue return air tickets for the Haj to Jeddah for these passengers;

(ii) apply and obtain the visas for these passengers;

(iii) make arrangements for accommodation in Jeddah for these passengers; and D

(iv) pay a commission of RM200 to the plaintiff for every passenger brought by him for the defendant.

The plaintiff claimed that DW1 agreed to the sum of RM5,500 per person as this was the amount the plaintiff had collected in 1990 and 1991 and that at all times the aforesaid arrangements were for the purposes of the passengers performing the Haj in May 1992. DW1 had also further stated that he was a registered agent who could also make such arrangements for the plaintiff. The plaintiff contended that DW1 agreed to the said terms and the plaintiff then immediately submitted the monies collected from the 100 persons together with their passports to the defendant. E F

The defendant on the other hand denies that there was such an agreement between the plaintiff and itself. I have watched the plaintiff testify. I accept his evidence that there was such an agreement. The plaintiff is a simple villager bent on making a commission out of this Haj/Umrah travel. All the ingredients necessary to constitute an oral agreement exist in this case. The defendant's contention that such an agreement ought to have been reduced to writing seems to ignore the existence of oral contracts. It is my finding that both the plaintiff and the defendant intended to create a binding contract. G

DW1 in his evidence, denied that the first meeting took place in December 1991 and he claimed that he first met with the plaintiff in 1989 as the plaintiff had been purchasing tickets from the defendant since 1989. He also denied being introduced to the plaintiff by Gurbakh. However, subsequently DW1 admitted knowing the plaintiff since 1991. Now to my mind the very fact that DW1 had maintained that he had known the plaintiff since 1989 because the plaintiff had been buying tickets from him and then subsequently admitting only knowing him since 1991 goes a long way in respect of his credibility. To my mind the fact that Gurbakh was not called by the plaintiff is not fatal to his case. I had, in the light of this contradictory H I

A evidence by DW1, rejected the defendant's application to call Gurbakh as a witness.

*The visa application*

The defendant through DW1 denied that it had agreed with the plaintiff to
B arrange the visas for the plaintiff's passengers. DW1 also denied making any representations to the plaintiff that he was a registered agent. DW4, one Zahariah bt Jamaluddin, the defendant's ticketing reservation clerk, stated that it was she who had dealt with the plaintiff personally and contended that the plaintiff never delivered the passports to the defendant because the defendant had never agreed to make the arrangements for the visas for the
C plaintiff's passengers. What is pertinent to note is that in the course of cross-examination of the plaintiff the following questions were asked:

> Q: Bolehkah kamu memberi butir-butir mengenai bagaimana RM5,500 diperolehi?
>
> A: RM5,500 ini kosnya menyiapkan persiapan tiket, visa dan penginapan ke
D Mekah.
>
> ...
>
> Q: Adakah jumlah RM5,500 yang dibayar kepada pihak defendan untuk tiap-tiap tiket termasuk komisen RM200?
>
> A: Ya.

E It was therefore in evidence that the sum of RM5,500 included the cost of the visa application and that the plaintiff was entitled to a commission of RM200 only for each passenger he was able to procure.

The defendant maintained that since it is a non-Muslim company, it cannot apply and obtain the visas for the passengers who wanted to perform
F the Haj. Since this is the defendant's allegation, I do not understand why the defendant failed to subpoena any witness from the Lembaga Urusan dan Tabung Haji to confirm if this is so. Instead the plaintiff applied to call such a witness after the defendant had commenced its evidence. I rejected the plaintiff's application on the basis that it was not the duty of the plaintiff to establish that fact since it was the defence who had raised that issue.

G Further it is inconceivable to imagine that the plaintiff, whilst collecting a sum of RM5,500 would split the sum, maintain an account, and go through the ordeal of applying for individual visas for 151 passengers when he could have easily gone to any other ticketing agent and obtained such a service. Besides, the plaintiff being a simple villager intending only on
H making a commission of RM200 on each passenger, could not be expected to provide a cumbersome service of applying for visas. I therefore reject the evidence of DW5, Abdul Razak bin Akhbar Ali, the manager of APB Travel & Tours Sdn Bhd, which was situated next door to the defendant's office and who testified that the plaintiff was seen filling up visa applications at an office space provided for him at APB Travel & Tours Sdn Bhd. I also reject
I the evidence of DW6, Nirmal Singh, the son of DW1, who also testified seeing the plaintiff filling up the visa forms at APB Travel & Tours Sdn Bhd. To my mind these two witnesses were called merely to lend credence to the

defendant's contention that it was the plaintiff who applied for the visas and that the defendant had nothing to do with the visa applications. A

The plaintiff's case is that he had collected 151 passengers to perform the Haj in May 1992 and from them he had obtained RM830,500 and that these monies had been paid over to the defendant progressively, either by cash or by Inward Banking Transfer (IBT). The defendant had issued receipts amounting to RM738,495 as shown by way of receipts found in the common agreed bundle of documents (CABD 59-72). According to the plaintiff the defendant did not give receipts for the balance of RM92,005.20 although the defendant had promised to do so. Whilst the plaintiff maintained that there were only 151 tickets involved, the defendant contended that there were altogether 249 tickets issued for the plaintiff's passengers to perform the Umrah in Mecca in 1992 and 199 tickets for the Haj in May 1992. B C

It is the plaintiff's case that upon full payment by him to the defendant for the 151 passengers, DW1 had informed him that these passengers were scheduled to leave by way of Biman Airlines from the Subang International Airport in two separate groups: D

(a) 74 passengers to depart on 11 May 1992

(b) 77 passengers to depart on 18 May 1992

The plaintiff then made his own arrangements for the departure of these 151 passengers from Kelantan to Kuala Lumpur. He purchased return air tickets from Cantumas Travel & Tours Sdn Bhd, a travel agency in Kota Bharu. He paid a total sum of RM27,180. The receipt for this is at CABD 52. E

On the evening of 11 May 1992 the first group of 74 passengers departed from Kota Bharu and arrived at the Subang International Airport. Based on the plaintiff's evidence, DW1 was supposed to have met him at the airport to hand him the air tickets, passports together with the visas for the said group of passengers. However DW1's son, Nirmal Singh (DW6) turned up at the airport instead and informed the plaintiff that the defendant could not manage to obtain the visas for these passengers and as such they could not depart on that scheduled flight. PW4 who was also present at the airport on that day confirmed this evidence of the plaintiff. He claimed that he was with the plaintiff when DW6 informed the plaintiff of the same. Moreover PW3 who was also scheduled to depart on that said flight confirmed that the plaintiff told the passengers as to what was stated by DW6. The plaintiff further contended that DW6 represented to the plaintiff on that same day that the first group of passengers could depart with the second group on 18 May 1992 when the defendant would have obtained all the visas by then. F G H

The plaintiff claimed that he had to make arrangements for accommodation and provide food for these passengers in Kuala Lumpur. He placed them in various hotels in Kuala Lumpur such as Hotel New Merdeka, Hotel Simma and Hotel Muda and paid for their accommodation and food. PW3 confirmed that she stayed in the New Merdeka Hotel in Kuala Lumpur. I

A Meanwhile, the plaintiff contended that on 12 May 1992 and thereafter the defendant through DW6 confirmed with the plaintiff that his first group of passengers could depart with the second group on 18 May 1992 when the visas would have been obtained by the defendant by then. PW4 in his evidence agreed that DW6 had made such representation to the plaintiff as he had accompanied the plaintiff several times to the defendant's office. B The plaintiff maintained that at all times he trusted and believed these representations of the defendant. He then made arrangements for the second group to leave Kota Bharu for Subang airport.

On 18 May 1992, the said second group of 77 passengers had arrived from Kota Bharu to Kuala Lumpur. The plaintiff who was already with the C first group at the airport waited for the defendant's representative. He was again informed by DW6 that the defendant still could not obtain the visas for the passengers and that all the passengers could not depart on that scheduled flight. According to the plaintiff all the said passengers were very angry. The plaintiff contended that he could not have prevented the second group from arriving at the Subang airport as the defendant at all material D times represented that the visas could be obtained and that these passengers could depart on the scheduled dates. The plaintiff further claimed that the defendant did not stop the plaintiff from bringing the second group to Kuala Lumpur.

The plaintiff again had to arrange for accommodation and food for the E second group of passengers. The plaintiff spent a total of RM53,286. The receipts are at CABD 53-58.

After the alleged events the plaintiff contended that DW6 requested the plaintiff to cooperate with the defendant in obtaining the visas for the said 151 passengers. After much hassle the plaintiff himself with the help of one Tuan Haji Che Isa bin Mahmad (PW4) managed to obtain the visas for the F 151 passengers on 27 May 1992.

With the visas the plaintiff then approached the defendant to book the flight for these passengers for 1 June 1992. However it was found to be fully booked. According to the plaintiff the defendant later tried to book the flight scheduled for 5 June 1992 but to the plaintiff's dismay the airport at Jeddah G was said to have been closed for the Haj season. The plaintiff's passengers had by then stayed on in Kuala Lumpur for about 26 days at the various hotels booked by the plaintiff. PW3 confirmed this in her evidence and it is also evident from the dates of the receipts at CABD 53-58. The passengers finally returned to Kota Bharu on 5 June 1992.

H I accept the evidence of the plaintiff and his witnesses. It is obvious that if the plaintiff was indeed responsible for obtaining the visas for these 151 passengers and since the visas were not available it would have been most fool-hardy of the plaintiff to have brought the passengers, being his own village neighbours, from Kota Bharu to Kuala Lumpur. I am certain that he would not have hazarded that. I have no hesitation in holding that it was the I defendant that had agreed to obtain the visas and had failed to obtain them in time for the passengers' departure.

Subsequently the plaintiff lodged a police report against the defendant. One Inspector Mazlan in charge of the investigations (PW2) was called by

the plaintiff to testify. He produced exh P1 which was a book containing the names of the 151 passengers which was seized by the Police in the course of its investigations. PW2 subsequently assisted both parties and exchanged 150 of the 151 tickets for 165 new air tickets with the plaintiff paying an additional RM77,000 through PW2, to the defendant. However, neither the plaintiff nor the defendant could state in evidence how much was the cost of the 150 tickets. However, DW4 testified that the price of one Haj ticket was RM1,920 and since PW2 testified that the defendant had given a discount of 25%, the plaintiff then calculated the cost of 150 tickets at 150 x RM1,440 amounting to RM216,000. The plaintiff therefore claimed RM830,500 - RM216,000 that is RM614,500.

*Damages*

Having found for the plaintiff, the next question is whether the plaintiff is entitled to make the various claims.

(i) RM614,500

Having initially claimed a sum of RM857,680 (in the pleadings) the plaintiff amended the claim on the trial date to read RM830,500. Finally the claim was for RM614,500. The question that comes to mind is whether the plaintiff is entitled to this claim. Even if the sum of RM830,500 is correct, there is no evidence before me that the 150 passengers had not been refunded their money nor been furnished a ticket subsequently. There is also no evidence that the 150 passengers had authorised the plaintiff to sue on their behalf. It is unfortunate that neither counsel addressed me on this. There is also no evidence that the plaintiff is suing on a representative capacity or on behalf of the 150 passengers. There is also no evidence why the passengers themselves did not sue. Is this a case of the plaintiff enriching himself? I will never know. In the circumstances much as I have found against the defendant, I am constrained to hold against the plaintiff for having failed to satisfy the court on his right to claim this sum.

(ii) RM27,180

This is the sum claimed by the plaintiff being the cost of 151 passengers being brought from Kota Bharu to Kuala Lumpur for the flight. CABD 52 is an agreed and admitted document. This shows clearly that 151 passengers were brought from Kota Bharu to Kuala Lumpur and also included their return flight. Whilst there is clear evidence that the plaintiff had indeed paid this sum, it is also clear that all 151 passengers had to travel to Kuala Lumpur to take the flight and subsequently they had to return to Kota Bharu. There is also evidence that the cost of RM5,500 did not include this internal flight. Since I have found that the passengers had indeed not left as scheduled because the defendant had failed to provide the visas for them, it is also clear that the plaintiff would certainly not be able to claim this cost from the 151 passengers who would certainly refuse to pay.

On the other hand, there is no evidence from the plaintiff that he did not collect this sum from the 151 passengers and that he had on his own paid this sum, and was seeking recovery. In the absence of such evidence and considering the fact that the plaintiff was only looking to a RM200

commission it seems unlikely in the absence of evidence from the plaintiff to that effect that he had made the up-front payment. In the circumstances, I hold that the plaintiff has failed to prove this item of damage.

(iii) RM53,286

This is the sum claimed by the plaintiff being his expenses incurred in putting up the 151 passengers in Kuala Lumpur when they were stranded from 11 May 1992 to 5 June 1992.

CABD 53-58 shows cash payment receipts from various hotels and restaurants. There is nothing on the receipts to link the payment to the plaintiff nor to this case. The least the plaintiff could have done was to call the hotel and restaurant proprietors to show the nexus. Unfortunately this was not done.

It is trite law that special damages must be both specifically pleaded and proved. In the circumstances it is my judgment that the plaintiff has also failed to prove this claim.

There is a claim for RM453 being service fees paid to the Lembaga Tabung Haji at RM3 per person for 151 persons. Unfortunately no evidence was led on this. I therefore take it that this claim has been abandoned.

*The counterclaim*

There was a faint-hearted plea in defamation by the defendant with no details or particulars. The defendant claimed that it had suffered loss of about RM50,000 to RM60,000 per year for five years. Whilst no evidence was led to substantiate this claim, it seems preposterous that suddenly after five years the defendant's reputation would have been restored for he makes no claim after that.

To my mind, such an ill-founded claim is totally unmeritorious. I have no hesitation therefore in dismissing this claim.

The defendant then claims that the plaintiff had admitted owing a sum of RM10,000 in its reply. However, the plaintiff had pleaded that the sum of RM10,000 is due and owing after having taken into consideration the plaintiff's claim. Since the admission is a conditional one and since I have dismissed the plaintiff's claim it follows therefore that there is no basis for the admission.

The defendant however claims a sum of RM7,680 based on the evidence as remaining due and owing from the plaintiff to the defendant. But this sum has not even been pleaded nor any application made orally to amend the pleadings to include this claim for RM7,680. In the circumstances, the counterclaim is dismissed with costs.

Since I have found for the plaintiff in so far as liability is concerned and had found that the plaintiff had failed to prove damages, I allow the plaintiff half the costs of the claim.

*Order accordingly.*

Reported by Jafisah Jaafar